

that this was no longer an issue. The Fund, in its Request For Review Before The Board, raised an issue concerning the calculation of claimant's average weekly wage. In addition, in its brief and during oral argument to the Board, the Fund raised additional issues concerning the compensability of the award which essentially go to the question of whether claimant proved he suffered personal injury by accident arising out of and in the course of his employment with respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the arguments and briefs of the parties, the Appeals Board finds and concludes as follows:

(1) Claimant suffered personal injury by accident arising out of and in the course of his employment on January 27, 1995.

Claimant was employed by respondent as an over-the-road truck driver. His duties sometimes included loading and unloading freight. On January 27, 1995 while unloading his truck, claimant slipped and fell out the back of his trailer striking his left shoulder and landing on his left leg. Claimant notified the respondent of his injury by telephone that same day and on January 30, 1995 was seen by Dr. Lanny Harris. Claimant was diagnosed with a torn medial meniscus and a nondisplaced fracture of the scapula. He was taken off work and underwent surgery for his left knee on April 19, 1995.

The Fund points out that there were no witnesses to the alleged accident and argues that based upon claimant's lack of credibility it is doubtful that he injured himself while on the job. Claimant's credibility is questioned primarily because he failed to disclose certain prior injuries to the physicians and was not forthcoming concerning those prior injuries at his deposition. Furthermore, the Fund contends that the fact claimant did not seek medical treatment in Topeka where his accident allegedly occurred but instead drove to Kansas City and did not see a doctor until three days later make it doubtful that the injury occurred as alleged.

As the Assistant Director points out in the Award, claimant's testimony concerning how his accident occurred is uncontroverted. Claimant's description of his accident is not improbable or unreasonable. Although the Fund raises some legitimate questions concerning claimant's credibility, his testimony concerning the accident has not been shown to be so untrustworthy that it should be disregarded. Therefore, claimant's testimony is regarded as conclusive on the issue of whether his accident arose out of and in the course of his employment with respondent.

(2) The claimant's gross average weekly wage is \$359.98.

The Assistant Director found claimant's average weekly wage should be \$788.38. This was described as the average of the two weeks of payroll records in evidence. The Fund points out that the record shows claimant was hired by respondent on December 26, 1994 and was continuously employed full-time with respondent until his

accident on January 27, 1995, a period of 4.71 weeks. The record further shows that claimant received three checks during his period of employment in the amounts of \$733.75, \$843.00 and \$118.75. The three checks total \$1,695.50. K.S.A. 44-511(b)(5) provides that the average gross weekly wage shall be the gross amount of money earned during the weeks employed immediately preceding the date of accident, divided by the number of weeks employed. Therefore, if claimant earned a total of \$1,695.50 for the 4.71 weeks he was employed by respondent, then his gross average weekly wage is \$359.98.

(3) Claimant has a 46.5 percent permanent partial disability.

The Assistant Director awarded claimant a 68.5 percent permanent partial disability based upon a 50 percent task loss and an 89 percent wage loss minus a 1 percent preexisting disability. Respondent and the Fund argue that claimant should be denied a work disability because he has failed to make a good faith effort to find work and the evidence establishes he retains the ability to earn at least 90 percent of his preinjury average weekly wage. The Appeals Board agrees that a wage should be imputed based upon ability.

Claimant was released by Dr. Lanny Harris to light duty work on August 1, 1995. Since the accident claimant has only worked part-time for a business owned by his brother repairing appliances and earning \$80 to \$90 per week. Claimant has not applied for work any place else. Although claimant has the ability to repair appliances, he has not applied for full-time work at any appliance repair store. Claimant also testified that he could operate a delivery van if it had an automatic transmission, but claimant has not applied for any work of this type either. It is significant that claimant has made approximately eight trips to Florida and, except for one occasion, has driven himself in his van each time. Claimant is not restricted from driving a truck if it has an automatic transmission.

The Appeals Board finds claimant has not made a good faith attempt to find suitable work. The evidence is sparse, however, concerning what claimant's actual post-injury earning ability may be. The Fund argues that the evidence supports a post-injury wage of at least minimum wage. When compared to the corrected average weekly wage of \$359.98, an imputed post-injury wage of \$206 per week calculates to a 43 percent wage loss. Combining this with the 50 percent task loss opinion by Dr. P. Brent Koprivica results in a work disability of 46.5 percent.

The Fund also disagrees with the finding by the Assistant Director that claimant's preexisting disability was only 1 percent. The Fund contends that claimant had a 4 percent preexisting disability. The argument for a credit pursuant to K.S.A. 44-501(c) is based upon the medical testimony to the effect that claimant had preexisting arthritis and a bipartite patella in his left knee. However, prior to the subject accident, claimant had never been given a functional impairment rating, work restrictions, or been advised that he had a physical impairment. The Appeals Board has held in the past that, in the absence of medical evidence to indicate there was a loss of a portion of the claimant's total physiological capabilities prior to the accident, that a credit is not warranted for an asymptomatic preexisting condition.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Assistant Director Brad E. Avery dated May 23, 1997 should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, William DeClements, and against the respondent, John Stalcup d/b/a J & S Trucking, and the Kansas Workers Compensation Fund, for an accidental injury which occurred January 27, 1995 and based upon an average weekly wage of \$359.98 for 192.98 weeks at the rate of \$240.00 per week or \$46,315.20 for a 46.5% permanent partial general disability.

As of May 31, 1998 there is due and owing claimant 174.29 weeks of permanent partial compensation at the rate of \$240.00 per week in the sum of \$41,829.60 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$4,485.60 is to be paid for 18.69 weeks at the rate of \$240.00 per week, until fully paid or further order of the Director.

The Appeals Board approves and adopts all other orders in the Award not inconsistent herewith.

IT IS SO ORDERED.

Dated this ____ day of May 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Gary R. Terrill, Overland Park, KS
David M. Druten, Kansas City, KS
B. Scott Tschudy, Overland Park, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director
Brad E. Avery, Assistant Director